NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 25. Argued October 22, 1970—Decided December 8, 1970

The General Mining Act of 1872 provided that until a patent issued for a mineral location on lands belonging to the United States "not less than $100 worth of labor shall be performed or improvements made during each year," and that a patent could issue on a showing that the claimant had expended $500 of labor or improvements on the claim. Failure to do the assessment work generally entitled others to relocate the claim. Under the Mineral Leasing Act of 1920 lands theretofore open to location and acquisition of title became available only on a lease basis, but a Saving Clause covered valid claims existent on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." All the claims involved in this suit were cancelled by the Secretary of the Interior in the early 1930's because the annual assessment work, required by the 1872 Act, had not been performed. In attempting to establish their oil shale claims in Colorado under the 1872 Act, respondents brought this action in the District Court to require the Secretary of the Interior to patent the claims or to expunge his rulings cancelling the claims for lack of annual assessment work and to enjoin him from enforcing them. The District Court and the Court of Appeals, ruling in favor of respondents, held that the Department of the Interior had no jurisdiction to cancel the claims. The courts relied on *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, where this Court declined to interpret the Mineral Leasing Act as requiring the return to the Government of full possessory rights to lands subject to oil shale claims for defaults in assessment work. The decisions indicated that failure to perform such work made the claims subject to reloca-

Syllabus

tion by others but not forfeiture to the Government. *Held:* The Saving Clause of the Mineral Leasing Act makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise, and the Department of the Interior had subject matter jurisdiction to determine whether respondents' claims were "maintained" within the meaning of that clause, including the performance of adequate assessment work. *Krushnic, supra,* and *Virginia-Colorado, supra,* must be confined to situations where there has been substantial compliance with the assessment work. Pp. 3–10.

406 F. 2d 259, reversed and remanded.

DOUGLAS, J., filed the opinion for the Court, in which BLACK, BRENNAN, and BLACKMUN, JJ., joined. STEWART, J., with whom THE CHIEF JUSTICE concurs, filed a dissenting statement. HARLAN, WHITE, and MARSHALL, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1970

Walter J. Hickel, Secretary of the Interior, Petitioner, *v.* The Oil Shale Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December 8, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves six groups of claims to oil shale located in Colorado and asserted under the General Mining Act of 1872, 17 Stat. 91, 30 U. S. C. §§ 22, 26, 28, and 29. Section 28 of that Act provided that until a patent issued "not less than $100 worth of labor shall be performed or improvements made during each year." [1] And § 29 provided that a patent to the claim could issue on showing that the claimant had expended $500 worth of labor or improvements on the claim. These claims are not patented and were cancelled in the early 1930's

[1] Section 28 reads:

". . . On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . ."

Section 29 reads in part:

". . . The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States supervisor of surveys that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors. . . ."

on the ground that the amount of labor or improvements specified in § 28 has not been made "during each year."[2]

Some of the claimants in this case applied for patents between 1955 and 1962. The Land Office rejected the patent applications because the claims had been cancelled. On appeal, the Secretary of the Interior, acting through the Solicitor, ruled that these cancellations were effective, later judicial determinations of the invalidity of the grounds for cancellation notwithstanding. *Union Oil Company*, 71 I. D. 169.[3] These claimants then sought an order to compel the Department to issue the patents. They argued that the Land Office was without authority to cancel the claims when it did and that the Secretary of the Interior had nullified all the contest proceedings in 1935. In the alternative, they sought judicial review of those contest rulings. Respondent—Oil Shale Corporation—commenced this action in the District Court, not to require the Secretary to issue a patent but to expunge the rulings of the Secretary cancelling the claims and to enjoin him from enforcing them. All the cases were consolidated for trial in the District Court. The District Court granted the relief, 261 F. Supp. 954, and the Court of Appeals affirmed, 406 F. 2d 259, both holding that cancellations for lack of assessment work were void because the Department did not have jurisdiction over the subject matter. The cases are here on petitions for certiorari which we granted to consider whether *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, had been correctly construed

[2] For a description of the claims involved in this case see the Appendix to this opinion.

[3] It was admitted that the cancellations may have been erroneous. He declared, however, that the Commissioner had jurisdiction to make the determinations. Therefore, since the rulings were not appealed from, they were *res judicata*, not subject to attack in 1962.

and applied to invalidate the Secretary's action in protection of the public domain.

Before we come to a consideration of the *Krushnic* and *Virginia-Colorado* cases it should be noted that in 1920, Congress by enacting the Leasing Act, 41 Stat. 445, 30 U. S. C. § 241 (a), completely changed the national policy over the disposition of oil shale lands. Thereafter such lands were no longer open to location and acquisition of title but only to lease. But § 37 contained a Savings Clause which covered "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Respondents contend that their claims fall within that exception.

Respondents assert that a like claim was recognized and approved in the *Krushnic* case. In that case, however, labor in the statutory amount had been performed, including the aggregate amount of $500. The only default was in the failure to perform labor for one year during the period. Mandamus for the issuance of a patent was directed, the Court saying:

> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership . . . , as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." 280 U. S., at 317.

The Court further held that the claims were "maintained" within the Savings Clause of the Leasing Act

by a resumption of the assessment work before a challenge of the claim by the United States had intervened.

Virginia-Colorado also involved claims on which labor had been expended except for one year. It was alleged, however, that the claimant had planned to resume the assessment work but for the Secretary's adverse action and that the claims had not been abandoned. The Court held that the claims had been "maintained" within the meaning of the Savings Clause of the Leasing Act of 1920.

Those two cases reflect a judicial attitude of fair treatment for claimants who have substantially completed the assessment work required by § 28. There are, however, *dicta* both in *Virginia-Colorado* and in *Krushnic* that the failure to do assessment work gives the government no ground of forfeiture but inures only for the benefit of relocators.

Indeed § 28 of the 1872 Act, as already noted,[4] provides that upon the failure to do the assessment work, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made" provided the assessment work has not been "resumed" upon the claim "after failure and before such location." It is therefore argued that so far as the 1872 Act is concerned the failure to do the assessment work concerns not the government but only "rival or adverse claimants." [5]

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[4] See n. 1, *supra*. For a recent account of the operation of the 1872 Act and the Leasing Act of 1920 see One Third of the Nation's Land, Report by the Public Land Law Review Commission, pp. 124–138.

[5] The regulations provide:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U. S. C. 28), is, . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." 43 CFR 3420.4.

The problem in those two cases and the present one concerns the Savings Clause in the Leasing Act which, as noted, makes available for patent "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated." Concededly failure to maintain a claim made it "subject to disposition only" by leasing by the United States. Hence if we assume, *arguendo*, that failure to do assessment work as provided in § 28 of the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act. For it was by that Act that Congress reclaimed portions of the public domain so that land might be disposed of by a different procedure (leasing) to the same end (oil shale production [6]) or devoted to wholly different purposes [7] within the purview of public policy as determined by Congress.

It appears that during the pre-1920's oil shale claims were affected by a speculative fever. Then came a period of calm. By the late forties and continuing into the sixties speculators soughts out the original locators or their heirs, obtained quit claim deeds from them, and

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[6] The value to the Government of the Leasing Act is shown by the magnitude of the interests at stake. We are told that respondent Oil Shale Corporation bid for a lease of 5,120 acres of federal oil shale land in Colorado. 33 Fed. Reg. 16154. The projected operations were estimated to yield 40 gallons of oil per ton, the royalty being 24¢ per ton. *Id.*, 16156. The projected mining rate of 66,000 tons per day for 330 days a year would produce an annual royalty of $5,250,000. The project life was 20 years.

[7] The lands containing oil shale became open to agricultural and other non-mineral entries including, *inter alia*, the Stock Raising Homestead Act of 1916, 39 Stat. 862, 43 U. S. C. § 291, to oil and gas and sodium leasing under the 1920 Act, to Indian tribal lands in Utah and to grazing districts under the Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315.

thereupon forfeited out all other record title holders by performing assessment work for one year.[8] It appears that 94 of the 98 claims involved in the present litigation were of that character. There is nothing reprehensible in the practice, if the procedure is one which Congress has approved. But the command of § 28 of the 1872 Act is that assessment work of $100 be done "during each year" and the Savings Clause of § 37 of the 1920 Act requires that for lands to escape the leasing requirement the claims must be "maintained in compliance with the laws under which initiated."

The legislative history of the 1872 Act does not throw much light on the problem. Senator Cole, proponent of that Act, explained, however, that the requirement of assessment work was made to adopt the Spanish law which granted mining titles but subjected them "to what they term denouncement of the title or defeasance of the title upon a failure to work the mine after a certain time." Cong. Globe, April 16, 1872, p. 2459. While the objective of the 1872 Act was to open the lands "to a beneficial use by some other party," once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee. On that premise it would seem that the dicta in *Krushnic* and in *Virginia-Colorado* are not valid.

The history of the 1920 Act throws a little light on the problem.

In the Senate there was a considerable debate over the addition of the words "including discovery" at the end of § 37, which contains the Savings Clause.

> "Mr. JONES of New Mexico. Suppose we use the words 'including discovery.'
>
> "Mr. SMOOT. Very well; if the Senator desires to insert the words 'including discovery' I shall offer no objection.

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[8] See n. 3, Appendix, *infra*.

"Mr. WALSH of Montana. Mr. President, I was going to say to Senators that to my mind discovery does not necessarily perfect the claim, because the claimant would not be entitled to a patent unless he had performed $500 worth of work, and in a just sense his claim would not be protected.

"Mr. SMOOT. The words 'under such laws' cover everything—the $500 worth of work, discovery, and everything else.

"Mr. WALSH of Montana. But the words 'including discovery,' now proposed, it seems to me, will make it plain.

"Mr. SMOOT. I have no objection to those words going in the bill." 58 Cong. Rec. 4584.[9]

The "perfection" of the claims "under such laws" thus seemingly meant compliance with "everything" under § 28 which taken literally would mean assessment work of $100 "during each year."

If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device. While the area covered by the claims might possibly be relocated for wholly different purposes, the likelihood was so remote that the Court of Appeals concluded that "The old claims were thus sheltered by the [1920] Act." That meant that a claim could remain immune from challenge by anyone with

[9] The Amendment was thereupon agreed to. There was no change made in the House in this respect. H. Rep. No. 398, 66th Cong., 1st Sess., p. 11. And see the Conference Report, H. R. Rep. No. 600, 66th Cong., 2d Sess., p. 16.

or without any assessment work, in compete defiance of the 1872 Act.

The Court concluded in *Virginia-Colorado,* that the lapse in assessment work was no basis for a charge of abandonment. 295 U. S., at 645–646. We construe that statement to mean that on the facts of that case failure to do the assessment work was not sufficient to establish abandonment. But it was well established that the failure to do assessment work was evidence of abandonment. *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349; *Donnelly* v. *United States,* 228 U. S. 243, 267. If in fact a claim had been abandoned, then the relocators were not the only ones interested. The United States had an interest in retrieving the lands. See Widman, Brightwell & Haggard, Legal Study of Oil Shale on Public Lands, 189–193 (1969). The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of § 28 of the 1872 Act is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their *dicta* to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory

title" of the claimant, granted by § 26, will not be disturbed on flimsy or insubstantial grounds.

Unlike the claims in *Krushnic* and *Virginia-Colorado,* the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the *dicta* in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work. We conclude therefore that the judgments below must be reversed.

Respondents rely upon the response of the Department of the Interior to the *Virginia-Colorado* case in which the Secretary declared the contest in that case to be "void." He also declared that "other Departmental decisions in conflict with this decision are hereby overruled." *The Shale Oil Company,* 55 I. D. 287. This decision, they argue, nullified the previous contest proceedings in which their claims were voided. Moreover, they contend that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed. In addition, they claim that these contest decisions, if still valid, are subject to direct judicial review at this time, testing both substantive and procedural errors, such as lack of notice.[10]

These contentions present questions not decided below. Therefore, on remand all issues relevant to the current

[10] The Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of Calif.,* 72 I. D. 313.

validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado*, as we have construed and limited these opinions.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent. They believe the Court of Appeals in this litigation correctly construed and applied this Court's decisions in *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639. Accordingly, unless those decisions are to be overruled, they would affirm the judgment before us.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX

One group of claims in question was composed of 48 (Bute) claims located by nine individuals between December 1919 and January 1920, shortly before February 25, 1920, the cutoff date for prior valid claims recognized by the Savings Clause of the 1920 Act.[1] The records show an entry in February 1921 of a "Notice in Lieu of Labor."[2] No other entries were made. In 1954, a man by the name of Ertl acquired the claims of two of this group. In 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice in the newspaper.[3] In 1956, he acquired a decree in a Colorado court quieting title in him to all interests in all the claims of this group. Another group of 18 (Atlas) claims was located in December 1919 by nine individuals. In

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[1] Section 37 of the Act, 30 U. S. C. § 193, reads in part: "That the deposits of . . . oil shale, herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[2] Congress suspended the $100 labor or improvements requirement for the year 1919. Such suspensions were also allowed by Congress for the years 1933 to 1938, 1942, 1943, 1948, and 1949.

[3] Section 28 of the 1872 Act provides that where any of several co-owners have not contributed his share of assessment work, one or more co-owners who have done the work may give the delinquent co-owner notice in writing or by publication for at least once a week for 90 days and if at the end of that time the delinquent fails or refuses to contribute his share, "his interest in the claim shall become the property of his co-owners who have made the required expenditures." That federal right is enforceable in state courts. See *Hamilton* v. *Ertl*, 146 Colo. 80.

For the history of the law which allows assessment work on one claim to inure to the benefit of a group of claims see *Union Oil Co.* v. *Smith*, 249 U. S. 337, 350–351.

February 1921 a "Notice in Lieu of Labor" was filed. No other instruments were filed. In 1954, Ertl acquired the interests of two of this group. In July 1955 he filed an "Affidavit of Annual Labor" and published a forfeiture notice. In September, a man named Dutton acquired an interest in the claims of two locators of this group and, in May 1956, Ertl quieted title in himself to the entire group. Another group of 20 (Camp Bird) claims were located in 1920. No instruments were filed regarding annual labor. In 1955, Mr. Dutton acquired the interests of two of the eight locators, and Mr. Ertl acquired the interests of four in 1956. Ertl filed an "Affidavit of Annual Labor" and published a forfeiture notice. Dutton responded and a court quieted title in the two of them, 75% in Ertl and 25% in Dutton.

In January, Ertl transferred all his interest in the above claims to Energy Resources Technology Land, Inc. (ERTL). Mr. Dutton transferred any interest he held in the above claims to ERTL and ERTL conveyed title to 16 of the Butte claims, Nos. 33–48 to Dutton. These 16 claims were eventually purchased by Oil Shale Corporation for $1,536,000. In 1963, Oil Shale leased all of the remaining claims from ERTL for $148,000 per year. Forty-six of the Butte claims, including the 16 purchased by Oil Shale, nine of the Atlas claims and all 20 of the Camp Bird claims are involved in the litigation here.

Another group of 20 claims (Carbon 1–8 and Elizabeth 1–12) passed through several hands, and after notice and forfeiture, as above, are held by Wasatch Development Company and Joseph Umpleby. Sixteen of these are involved here. Another group of four SW, NW, NE, & SE) claims have a similar history, and three of those are involved here. The last group of claims (Oyler Nos. 1–4) is the only group in which there has been no claim of forfeiture. All four of these are involved here.

